

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**FIRST APPEAL No. 437 of 2007**  
**With**  
**CIVIL APPLICATION No. 1480 of 2007**  
**In FIRST APPEAL No. 437 of 2007**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE A.M.KAPADIA**  
**HONOURABLE MS.JUSTICE H.N.DEVANI**

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1 Whether Reporters of Local Papers may be allowed  
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy  
of the judgment ?

4 Whether this case involves a substantial question  
of law as to the interpretation of the  
constitution of India, 1950 or any order made  
thereunder ?

5 Whether it is to be circulated to the civil judge  
?

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**ORIENTAL INSURANCE CO.LTD. - Appellant(s)**  
**Versus**  
**MANIBEN WD/O DHIRABHAI SARDARBHAI SUTAR & 6 -**  
**Respondent(s)**

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**Appearance :**

MR KK NAIR for Appellant(s) : 1,  
MR SUNIL MEHTA FOR MR SK BUKHARI for Respondent : 1,  
None for Respondent(s) : 2 - 7.

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**CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA**

**and**

**HONOURABLE MS.JUSTICE H.N.DEVANI**

**Date : 27/07/2007**

**ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)**

1. Challenge in this appeal filed under Section 173 of the Motor Vehicles Act ('the Act' for short) is to the judgment and award dated January 27, 2005 rendered in MACP No. 2430 of 1999 by the Motor Accident Claims Tribunal (Aux.) Panchmahals at Godhra ('the Tribunal' for short) by which the claim petition filed under Section 166 of the Act by respondent Nos.1 to 5/ original claimants ('the claimants' for short) against the appellant - The Oriental Insurance Company Limited and respondent Nos.6 and 7, i.e., driver and owner of the motor vehicle involved in the accident being Tempo bearing registration No. GJ-20-T-3096, to recover compensation of Rs.12,65,500/- on account of the untimely demise of Dhirabhai Sardarbhai Suthar in a road accident which took place on 6.11.1999 has been partly allowed and thereby the appellant-insurance company and respondent Nos.6 and 7, driver and owner were directed to pay, jointly and severally, a sum of Rs.6,90,000/-

together with interest at the rate of 9% per annum from the date of the application till realization and proportionate costs, as compensation to the claimants.

2. As per the averments made in the claim petition, on the fateful day i.e., 6.11.1999, deceased Dhirabhai was proceeding on his cycle in company of Rameshbhai as a pillion rider on Shahera-Zoz road. He was riding the cycle on the left side of the road with care and caution. At about 7.30 P.M. when he reached Zoz village crossing, respondent No. 6 came driving the tempo bearing registration No. GJ-20-T-3096 from the opposite direction, in a rash and negligent manner, with full speed, without any lights on and as he lost control over the tempo, he dashed it with the cycle ridden by Dhirabhai. As a result of the impact, Dhirabhai and pillion rider Rameshbhai were thrown off the cycle, fell on the road, sustained serious multiple injuries and succumbed to the same after suffering

excruciating pain for a long time.

2.1. According to the averments made in the claim petition, the accident took place due to rash and negligent driving on the part of the driver of the offending tempo. Therefore, he was primarily liable to pay compensation. Since the offending tempo was owned by respondent No.7, he was vicariously liable to pay compensation for the wrong committed by his driver. The said tempo was insured with the appellant and, therefore, the appellant was liable to indemnify the insured i.e., respondent No.7, and was liable to satisfy the amount of compensation awarded by the Tribunal in favour of the claimants and, therefore, the driver, insured and the insurer all were jointly and severally liable to pay compensation to the claimants as may be awarded in favour of the claimants by the Tribunal.

2.2. Putting forward the claim for compensation, it was averred by the claimants

that at the time of accident, Dhirabhai was aged 26 years and he was maintaining his wife and four minor children and father and mother. His father died during the pendency of the claim petition and, therefore, his name came to be deleted.

2.3. At the time of accident, deceased Dhirabhai was engaged in preparing snacks and sweets and was earning Rs.4000/- and he was also getting Rs.500/- by way of additional salary per month and thus he was earning Rs.4500/- per month at the time of accident. He was contributing Rs.60,000/- per annum to his family. Therefore, on the ground of loss of dependency benefit, expectation of life, consortium, mental pain, shock and sufferings and funeral expenses the claimants claimed total compensation of Rs.12,65,500/- with interest and cost from the driver, owner and insurance company of the offending tempo.

3. The claim petition was contested by the

appellant - The Oriental Insurance Company Limited by filing written statement at Ex.19 wherein, inter alia, the brief particulars of the accident were not admitted. It was denied that on 6.11.1999 Dhirabhai was riding the bicycle slowly and carefully and at moderate speed on the correct side of the road and at that time the driver of the tempo came with his tempo from Godhra side driving it in a rash and negligent manner with an excessive speed and as he lost control over it, it left the road and dashed with the cycle of deceased Dhirabhai and Dhirabhai sustained serious injuries. It was also denied that the driver of the tempo was driving it in a rash and negligent manner. It was contended that the accident had taken place due to rash and negligent riding of the cycle on the part of the deceased cyclist, who lost control over it and dashed it with the tempo and as a result of which he fell down and sustained injuries and hence the driver of the tempo was not liable to pay any amount to the claimants as compensation.

3.1. So far as claim of compensation put forwarded by the claimants is concerned, it was also denied. Age of deceased and his income as well as other claims were also denied. It was also denied that in future the deceased would have earned more amount. It was also pleaded that the claimants are not entitled to interest on the future economic loss. Therefore, it was prayed to dismiss the claim petition filed by the claimants.

4. On the pleadings of the parties, the Tribunal framed issues and after considering the evidence, oral as well as documentary, and more particularly the oral evidence of Udesinh Gulabbhai, an eye witness to the accident, at Ex.28 and also Exs.24 and 25, complaint as well as Panchnama, adduced and produced by the claimants and the submissions advanced by the learned advocates appearing for the parties, came to the conclusion that the accident was the result of rash and negligent driving on the part

of the driver of the offending tempo, i.e., respondent No.6 and his negligent driving claimed lives of two promising young men and, therefore, the driver of the offending tempo was held liable for the accident and primarily liable to pay compensation.

4.1. It was further held that since the the driver of the tempo, i.e., respondent No.6, was held liable for causing the accident, respondent No.7, being the owner of the tempo, was vicariously liable to pay the compensation and the appellant being the insurance company of the offending tempo, it was liable to indemnify the award which was going to be passed against the driver and owner of the tempo insured with it and, therefore, held that respondent No.6 and 7 and the appellant being the driver, owner and insurer of the offending tempo, jointly and severally liable to pay compensation to the claimants.

4.2. So far as the quantification of

compensation is concerned, the Tribunal, on the basis of the evidence of Maniben, widow of Dhirabhai, Ex.23 as well as evidence of Sundarbhai Mulchand Desrani, the owner of the shop where deceased Dhirabhai was serving, Ex.29, came to the conclusion that the deceased Dhirabhai was at the relevant time 26 years old and he was serving in the shop of Sundarbhai Desrani since last six years prior to the accident and also came to the conclusion that the deceased was earning Rs.2000/- by way of salary from the shop of Sundarbhai Desrani. The Tribunal on the basis of the said evidence also estimated the future income at Rs.6,000/- and thereafter decided the prospective average income at Rs.4,000/- and applied 18 multiplier and determined the loss of dependency benefit at Rs.8,64,000/- and then deducted  $\frac{1}{4}$  amount from it for the personal upkeep of the deceased and worked out the loss of dependency benefit at Rs.6,48,000/- and thereafter added the amounts under various heads like pain, shock and sufferings, obsequial ceremonies and consortium

and awarded the amount of compensation to the claimants in the following break-up:

Rs. 8,64,000.00 Future loss of income  
(4000x12x18)

Rs. 2,16,000.00  $\frac{1}{4}$  for personal upkeep

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Rs. 6,48,000.00 Loss of dependency benefits.

Rs. 15,000.00 Pain, shock and sufferings.

Rs. 7,000.00 Obsequial ceremonies

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Rs. 6,70,000.00

Rs. 20,000.00 Loss of consortium

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Rs. 6,90,000.00 Total compensation

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Thus the Tribunal has awarded Rs.6,90,000/- with interest at the rate of 9% per annum from the date of the application till realization together with proportionate costs of the claim petition which has given rise to instant appeal at the instance of the appellant - The Oriental Insurance Company Limited.

5. In support of the appeal, Mr. KK Nair, learned advocate appearing for the appellant, has mainly confined his submission to the quantum of compensation awarded to the claimants and according to him it is on higher side. According to him, the Tribunal has committed grave error in believing the story of the claimants that the deceased was working at Sonu Farsan Mart on Lunawada Highway and was earning Rs.4000/- as salary plus Rs.500/- as over time per month. It is also highlighted by him that the Tribunal has wrongly deducted  $\frac{1}{4}$  for the personal upkeep of the deceased. Instead of that the Tribunal ought to have deducted  $\frac{1}{3}$  amount for his personal upkeep as per the principles enunciated by the Supreme Court as well as various High courts. It is also emphatically submitted by him that the Tribunal has applied 18 multiplier by resorting to second schedule all the while overlooking the fact that this is not a case under Section 163-A of the Act wherein future prospective income is not to be considered and hence multiplier of 15 would be

the proper multiplier. It is also pointed out that the amount of Rs.15,000/- awarded under the head of pain, shock and suffering is also required to be interfered with as the victim died instantaneously. In sum and substance, the contention of Mr. Nair is that the award made by the Tribunal is extremely on higher side which is required to be suitably modified by awarding just, proper and adequate dependency benefits. Therefore, according to him, the appeal is required to be allowed. He, therefore, urged to allow the appeal.

6. Per contra, Mr. Sunil Mehta, learned advocate for Mr. SK Bukhari, learned advocate for the claimants, has contended that the impugned award does not require any interference as the Tribunal has rightly considered average prospective income of the deceased as he was engaged in preparing snacks and sweets in the shop owned by Sundarbhai Desrani. According to him, the Tribunal has rightly awarded just compensation looking to the erosion of rupee

value and inflationary trend. On the aforesaid premises, according to him, the impugned award does not require interference in this appeal filed under Section 173 of the Act. He, therefore, urged to dismiss the appeal.

7. We have considered the submissions advanced by Mr. KK Nair, learned advocate for the appellant and Mr. Sunil Mehta, learned advocate for Mr. Bukhari, learned advocate for the claimants. We have also perused the impugned award as well as the averments made in the claim petition and the memo of appeal and the submissions advanced at the bar by the learned advocates appearing for the parties and also the set of oral as well as documentary evidence supplied by the learned advocate for the appellant during the course of his submissions.

8. So far as the factum of involvement of the motor vehicle in the accident as well as the negligence on the part of the driver of the offending motor vehicle are concerned, no dispute

is raised in the appeal. It may be noted that claimant No.1 is not an eye witness to the incident. Therefore, on behalf of the claimants, reliance is placed on the evidence of Udesinh Gulabbhai, Ex.28, who is an eye witness to the accident. He, inter alia, testified that he was doing agricultural work in village Zoz. On 6.11.1999, i.e., the day of the accident, at about 7 - 7.15 PM he was standing on the road near Zoz, which is on Godhra-Shahera highway. At that time he saw a cyclist with pillion rider coming from Shahera side and a tempo was coming from Godhra side. The tempo was driven by its driver in an excessive speed and in a rash and negligent manner without lights on and the tempo dashed with the cyclist. He immediately ran towards the place of mishap. He saw the rider of the cycle and pillion rider both were lying on the road. Both of them died instantaneously. He noted down the registration number of the tempo which was GJ-20-T-3096. In cross-examination a suggestion was put to him that the driver of the tempo was not rash or negligent in driving the

tempo which was denied by him. Another suggestion put to him was to the effect that the cyclist lost control over the cycle and, therefore, he fell down which was denied by him. He repelled both the suggestions. This witness successfully withstood the test of cross-examination. Therefore, according to us, there is no reason to disbelieve the eye witness who has given correct account of the accident.

8.1. Besides this, the claimants also relied upon the written complaint Ex.24 wherein the accident has been fully narrated. It was also mentioned therein that the driver of the tempo fled from the place of the accident.

8.2. There is also evidence in the form of panchnama Ex.25 which clearly establishes that the driver of the tempo went on the extreme wrong side of the road and dashed with the cyclist and, therefore, the accident had taken place.

8.3. In view of the aforesaid oral as well as

documentary evidence, the Tribunal has rightly come to the conclusion that the accident was the result of rash and negligent driving of the tempo on the part of its driver which, according to us, is just and proper and, therefore, we confirm the said finding of the Tribunal.

9. Now the next question which is required to be considered by this Court is whether the compensation awarded by the Tribunal is just and reasonable or is it on higher side.

10. In this connection, now advertng to the evidence of Maniben, widow of Dhirabhai Suthar, in the form of affidavit which is at Ex.23, it is clear that she has, inter alia, stated that her husband was serving at Sonu Farsan Mart and was preparing snacks and sweets and was earning Rs.4,000/- by way of salary and he was also getting Rs.500 as over time. He had no vices and he was aged 26 years at the time of accident. She lost the company of her husband at a very young age and her four children have also lost the love

and affection of their father. The claimants, therefore, claimed in all Rs.12,65,500/- by way of compensation.

10.1. During cross-examination she has admitted that there was no evidence with her to show that her husband was serving at Sonu Farsan Mart nor she has got any documentary evidence to establish the income of her husband. However, she successfully repelled the suggestion that her husband was earning only Rs.500/- to Rs.700/- per month by doing labour work.

11. To fortify the income of the deceased, the claimants relied upon the evidence of Sundarbhai Mulchand Desrani, Ex.29. He has inter alia testified that he was having a shop in the name of Sonu Farsan Mart at Lunawada Highway. He was running the said shop since last 11 years. Deceased Dhirabhai was serving in his shop since last six years. The deceased was preparing snacks and sweets and he was paid salary of Rs.3,200/- per month. Besides this he was also paid cycle

charges. He was given break-fast and lunch free of charge. He was also given bonus as well as clothes during Diwali. He has testified that had Dhirabhai not died in the accident, he would have earned Rs.4500/- per month as salary. In cross-examination he has admitted that there is no documentary evidence to suggest that he was paying Rs.3200/- to the deceased. However, according to us, there is no reason to disbelieve the evidence of Sundarbhai Mulchand Desrani to establish that deceased Dhirabhai was working in his shop and was earning salary from from him.

12. Now the question which requires to be considered is what should be the average prospective income of the deceased? Looking to the evidence of Sundarbhai Mulchand Desrani as well as the inflationary trend of the rupee and by conjectures and surmises if we estimate the average prospective income of the deceased at Rs.4000/- per month it cannot be said to be on higher side. Therefore, the Tribunal has rightly assessed the average prospective income of the

deceased at Rs.4,000/- The Tribunal has applied 18 purchase factor which, according to us, is on higher side. According to us, the Tribunal ought to have applied only 15 purchase factor and in doing so the average prospective income would be arrived at  $\text{Rs.}4000 \times 12 \times 15 = \text{Rs.}7,20,000/-$  From this the Tribunal has deducted  $1/4$  for the personal upkeep of the deceased. Considering the large family of the deceased, the Tribunal has rightly deducted  $1/4$  for the personal upkeep of the deceased. Therefore, an amount of Rs.1,80,000/- is required to be deducted from Rs.7,20,000/- which reduces the prospective income to Rs.5,40,000/- Therefore the net loss of dependency benefit available to the claimants would come to Rs.5,40,000/-

12.1. The Tribunal has awarded Rs.15,000/- under the head of pain, shock and sufferings which, according to us, is not justified as deceased died an instantaneous death and, therefore, under the head of mental pain, shock and sufferings no amount can be awarded. However,

the Tribunal has not awarded any amount under the head of loss of expectation of life. Normally under the head of loss of expectation of life, looking to the inflationary trend, Rs.20,000/- is awarded and, therefore, we propose to award Rs.20,000/- under the head of loss of expectation of life. As claimant No.1 lost love and affection of her husband and her four minor children lost the protective umbrella of their father at the very young Age, under the head of consortium, we award Rs.10,000/- We also propose to award Rs.10,000/- for the obsequial ceremonies instead of Rs.7,000/- awarded by the Tribunal. Thus, the claimants are entitled to the compensation on the following break-up:

Rs. 5,40,000 loss of dependency benefit  
Rs. 20,000 loss of expectation of life  
Rs. 10,000 consortium  
Rs. 10,000 obsequial ceremonies

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Rs. 5,80,000 Total compensation

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Therefore, the claimants are entitled by way of

compensation Rs.5,80,000/- with interest at the rate of 9% per annum from the date of application till realization with proportionate costs of the claim petition.

13. It has also come in evidence that claimant No.1 is the widow of deceased Dhirabhai and claimant Nos.2, 3, 4 and 4-A are minor children of Dhirabhai. Original claimant No.5, was father of deceased Dhirabhai and since he died during the pendency of the claim petition, his name was deleted. Original claimant No.6 is the mother of deceased Dhirabhai. Therefore, we propose to apportion the compensation among the claimants as under:

13.1. Claimant No.1 is entitled to 50% and claimant Nos.2, 3, 4, 4-A and 5 are entitled to 10% each of the total amount of compensation. Therefore, the award is required to be modified so far as the apportionment is concerned.

14. Seen in the above context, the appeal

deserves to be allowed in part by reducing the amount of compensation and the award is also required to be modified to the extent indicated in this judgment.

15. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed with no order as to costs of this appeal. The impugned judgment and award dated 27.1.2005 awarding compensation of Rs.6,90,000/- is hereby modified by awarding total compensation of of Rs.5,80,000/- instead of Rs.6,90,000/-, together with interest at the rate of 9% per annum from the date of the application till realization with proportionate costs of the claim petition. The Tribunal is directed to apportion the amount of compensation awarded to the claimants as under:

(i) Claimant No.1 shall be paid 50% of the total amount of compensation.

(ii) Claimant Nos.2, 3, 4, 4-A and 5 i.e., Daliben Sardarbhai Suthar, mother of deceased Dhirabhai Suthar shall be paid 10% each of the

total amount of compensation.

(iii) The Tribunal is further directed to invest 70% of the amount from the total amount of compensation payable to claimant Nos.1 and 5, in any nationalized bank for a period of five years, yielding higher rate of interest, in their respective name on which they are entitled to receive periodical interest with a rider that they are not permitted to encash the said FDR prematurely or to take advance or create any encumbrance upon them. Remaining 30% amount that comes to the share of claimant Nos.1 and 5, as per the apportionment made herein above, shall be paid to each of them by account payee cheque in their respective name.

(iv) So far as the claimant Nos.2, 3, 4 and 4-A are concerned, they are minors and, therefore, the Tribunal shall invest the entire amount of compensation awarded to them i.e., 100% of the amount that comes to their respective share, in the joint names of each minor claimant and claimant No.1, Maniben, widow of Dhirabhai Sardarbhai Suthar, being the guardian of the

minors, in any nationalized bank for a period of five years, yielding higher rate of interest, on which they are entitled to receive periodical interest which shall be utilized for the upkeep of the minor children with a rider that they are not permitted to encash the said FDR prematurely or to take advance or create any encumbrance upon them. On reaching the maturity of the FDR the same shall be renewed till each of the minor claimants reach the age of majority.

Modified award to be drawn up accordingly.

16. As the appeal is partly allowed, the civil application now does not assume any survival value and hence the same is disposed of with no order as to costs.

(A.M. Kapadia, J.)

(Harsha Devani, J.)

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